In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 386

RISS AND COMPANY, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellee United States of America moves that the judgment of the district court be affirmed.

This is a direct appeal, pursuant to 28 U.S.C. 1253, from the final judgment entered on May 7, 1953,[1] by a specially constituted three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325, dismissing an action brought by appellant to set aside an order of the Interstate Commerce Commission. Appeal was allowed on August 24, 1953. The appeal papers were served

[1] On July 7, 1953, the district court denied appellant's motion for a new trial. The opinion of the district court is unreported, but a copy thereof is attached to appellant's Statement as to Jurisdiction.

by mail on August 26, 1953 and received on August 27, 1953.

The order of the Commission, here attacked, required appellant to limit its transportation of explosives to the points determined by the Commission to fall within the scope of its temporary authority.

Appellant's temporary authority to engage in the transportation of explosives was issued (under Docket No. MC-200 (Sub-No. 60-TA)) to it on April 15, 1946, pursuant to the provisions of section 210(a) of the Interstate Commerce Act, 49 U.S.C. 310(a),[2] The permit[3] in terms authorized appellant to transport explosives

> to, from, and/or between points and places authorized to be served in connection with Docket Nos. MC-30077 and effective sub-

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[2] Section 210 (a) of the Interstate Commerce Act, as amended, reads in part as follows:

> "To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier . . ."

[3] As shown in the opinion of the district court, this permit was the last of a series of similar permits issued for successive periods of time by the Commission since the initial filing for such temporary authority by appellant's predecessor in interest in 1942. The authority, as set forth in the existing permit, is continued in effect pending the Commission's determination of an application for permanent authority embracing such rights and others filed by the appellant.

numbers thereunder which were acquired by appellant herein.[4]

The proceeding leading to the issuance of the Commission's order of June 2, 1952, was instituted by the Commission as a result of a petition filed by certain Class I railroads, in which it was requested that the Commission require the appellant to discontinue operations alleged in said petition to be beyond the scope of appellant's temporary authority. Said petition was filed with the Commission on February 26, 1952, and served on the appellant on the same date. On April 1, 1952, appellant, after obtaining from the Commission an extension of time in which to reply to the petition, filed its answer incorporating a motion to dismiss. In that pleading appellant argued in some detail that the Commission was without authority to issue the order as requested by the railroad petitioners, and set forth other reasons why it believed that the petition should not be granted. Thereafter, upon consideration of the railroads' petition and the appellant's answer, the Commission issued the above-described order of June 2, 1952. On July 1, 1952, appellant filed a petition for reconsideration in which it set forth additional arguments why it believed the June 2 order was erroneous. This petition was denied on July 14, 1953.

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[4] The docket numbers here stated covered the "grandfather" application for general-commodity authority filed by appellant's predecessor in interest. After the purchase of such rights by the appellant, the proceeding was described as Docket No. MC-200 (Sub-No. 46).

It is submitted that this appeal presents no substantial question. In its Statement as to Jurisdiction, appellant urges that the Commission's order fails to comply with the requirements of section 204(c) of the Interstate Commerce Act, as amended, 49 U.S.C. 304(c),[5] in that notice and hearing, as required by that section, were not provided. The district court found to the contrary. Specifically, as to notice, it found that the record before it showed

> * * * service on Riss [the appellant] of a copy of the Railroads' petition on February 26, 1952 (Exh. 20, p. 117). Riss sought and obtained extension of time, until April 1, to answer (Exh. 20, p. 184). Riss filed answer and motion to dismiss on April 1 (Exh. 20, p. 89). There is no merit in the contention that Riss did not have proper and sufficient notice.

In support of its contention that it was not afforded an adequate hearing, appellant complains (Statement as to Jurisdiction, pp. 10, 11) that it

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[5] Section 204 (c) provides that "Upon complaint in writing to the Commission * * * or upon its own initiative without complaint, the Commission may investigate whether any motor carrier * * * has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier * * * has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier * * * to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

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was not given the opportunity to cross-examine witnesses, to inspect materials relied upon by the railroads, and to offer its own evidence in rebuttal or explanation. However, as the record will disclose, the railroads offered no testimony or witnesses, and there was nothing of a factual nature for the appellant to rebut or explain. The right to a full and fair hearing does not include the right to challenge or rely on evidence not offered or considered, or relevant to the inquiry. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575.

As the Commission and district court opinions point out, the sole issue raised by the pleadings was one of interpretation—the meaning of the language contained in appellant's temporary authority. The temporary authority (Sub-No. 60-TA), as indicated above, is to serve points set out in appellant's certificate authorizing the carriage of general commodities (Sub-No. 46). At the time the petition in the instant case was filed, the Commission's order fixing the limits of appellant's general-commodity authority had become final. That order had been attacked by this same appellant as giving it too limited authority, but had been ultimately sustained by a decision of the Supreme Court. *Riss & Co., Inc.* v. *United States, et al.*, 342 U.S. 937, affirming 100 F. Supp. 468 (W.D. Mo.). Accordingly, in the instant proceeding, the Commission was in a position to specify the points covered by the temporary authority by resort to its own records.

In these circumstances, it is plain that there was no factual issue requiring the taking of evidence. The matter was susceptible of determination upon consideration of the permit itself and the relevant prior orders of the Commission. As the district court opinion states, the reports and orders which formed the basis of the Commission's decision had been specifically identified in the pleadings. Indeed, appellant's own petition for reconsideration filed with the Commission (Pet. for Recon., p. 7) conceded that the issue was "of course solely a question of law." That being so, obviously there was no occasion or necessity to take evidence.[6]

As an additional point, appellant contends that the district court erred in refusing to review the Commission's holdings concerning the scope of its authority. The court refused only to rule on one contention advanced by appellant—the claim that the order of June 2, 1952, rather than limiting appellant to the scope of its rights as set forth in its certificate in Sub-No. 46, required it to operate in

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[6] The district court believed that there was also involved the subordinate question whether appellant was contemporaneously exceeding the scope of its lawful temporary authority. The court noted, in this connection that statements in the appellant's pleadings implicitly admitted an operation going beyond that found lawful by the Commission. While we believe the court was correct in its interpretation of the pleadings, we do not believe that there is a real issue on this point. The Commission's order did not purport to assess penalties or collect fines for unlawful operations conducted in the past. It merely required that appellant discontinue, in the future, operations found by the Commission to be beyond the scope of the temporary permit.

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a more restricted manner. In refusing to rule on this contention, the district court held that appellant's failure to submit its certificate in Sub-No. 46 precluded the court from comparing the scope of the rights there set forth with those set forth in the appendix to the Sub-No. 60TA proceeding. In thus ruling, the court was simply reiterating the well-established principle that it cannot rule on contentions challenging the validity of a Commission order in the absence of presentation of all of the relevant materials upon which it was based. See *Lubetich* v. *United States,* 315 U.S. 57, 58; *Mississippi Valley Barge Line* v. *United States,* 292 U.S. 282, 286.

CONCLUSION

For the foregoing reasons, it is submitted the appeal presents no substantial question and that the judgment of the district court should be affirmed.

ROBERT L. STERN,
Acting Solicitor General.

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